82-1556

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOHN F. DUFFY, the Sheriff of San Diego County, California.
Petitioner,

v.

THE BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, SAN DIEGO COUNTY, CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an Indian bingo operation to be conducted on an Indian Reservation as a money making gambling business is contrary to California public policy and therefore violative of Federal law.

PARTIES TO THE PROCEEDINGS

This litigation was commenced by the filing of a complaint for declaratory and injunctive relief. Petitioner is John F. Duffy, Sheriff of the County of San Diego (hereinafter referred to as the "Sheriff"). Respondent is the Barona Group of the Capitan Grande Band of Mission Indians, San Diego County, California (hereinafter referred to as the "Barona Group").

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 694 F.2d 1185 and is reprinted as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent Federal statutes involved are Public Law 280, codified as 18 U.S.C. § 1162 and 28 U.S.C. § 1360, and the Organized Crime Control Act of 1970, 18 U.S.C. § 1955.

The pertinent State provisions involved are California Constitution, Article IV, § 19; California Penal Code § 326.5; and San Diego County Code of Regulatory Ordinances, §§ 37.101 - 37.317. Both State and Federal statutory provisions are set out in Appendix B.

STATEMENT OF THE CASE

On June 1, 1976, the Board of Supervisors of the County of San Diego duly adopted an ordinance pursuant to Article IV, § 19 of the California Constitution and California Penal Code § 326.5 in order to make the game of bingo for charitable purposes lawful under the terms and conditions of said ordinance. (San Diego County Code of Regulatory Ordinances, §§ 37.101 - 37.317). The ordinance became effective on July 1, 1976 and is presently in full force and effect. The Barona Group is located within an unincorporated area of San Diego County and its land is held in trust by the United States of America.

On April 20, 1981, the Tribe Council of the Barona Group enacted a tribal ordinance authorizing, with certain restrictions, the playing of bingo within the Reservation. The Barona Group subsequently entered into a management agreement with American Amusement Management, Inc. (hereinafter referred to as the

"contractor") to commence a bingo operation on the Reservation. The Barona Group's ordinance did not comply with the laws of the State of California or the Bingo Ordinance of the County of San Diego since it set no limit on prize money for any single game, established time limits for hours of operation broader than those allowed by State law, is operated and staffed by persons other than by an organizing, exempt organization who takes a profit from the activity and conducts the game as a money making gambling business rather than for charity.

On June 25, 1981, the Undersheriff, under the authority of the Sheriff of the County of San Diego, informed representatives of the Barona Group that the Bingo Ordinance of the County of San Diego prohibited the Barona Group's bingo operation. The Sheriff, through the Undersheriff, also stated that the County Bingo Ordinance would be enforced to the extent of entry on the Reservation to cite or arrest the participants in the bingo operation. On July 28, 1982, the Barona Group sought injunctive and declaratory relief against the Sheriff on the ground that the Sheriff is without lawful authority to enforce State or County laws regarding bingo on the Reservation.

On April 22, 1982, the District Court granted the Sheriff's cross-motion for summary judgment and denied the Barona Group's motion for summary judgment.

On December 20, 1982, the Court of Appeals in *The Barona Group of the Capitan Grande Band of Mission Indians, San Diego County, California* v. *John Duffy*, 694 F.2d 1185 (9th Cir. 1982) reversed the District Court's judgment and remanded the matter back to the District Court with judgment to be entered accordingly, which was so entered on February 17, 1983.

REASONS FOR GRANTING THE WRIT

THE PUBLIC POLICY OF THIS STATE ALLOWS BINGO ONLY FOR CHARITABLE PURPOSES AND NOT AS A LARGE-SCALE MONEY MAKING GAMBLING BUSINESS.

The Ninth Circuit, in *The Barona Group of the Capitan Grande Band of Mission Indians, San Diego County, California* v. *John Duffy,* 694 F.2d 1185 (9th Cir. 1982) misinterpreted the public policy of this State and misapplied the law as announced in *United States* v. *Farris,* 624 F.2d 890 (9th Cir. 1980), cert. denied 449 U.S. 1111 (1981). It is the public policy of the State of California that lotteries are prohibited except *bingo for charitable purposes.* (Cal.Const., Art. IV, § 19; California Penal Code § 326.5.) The general prohibition to lotteries specified in the California Constitution is removed only so long as bingo is conducted for charitable purposes. There are no exceptions to this rule. The public policy of this State never intended allowing lotteries, which include bingo, to be conducted for any purpose other than for charity.

The decision of the Court of Appeals misinterprets the public policy of this State. If the stated purpose of the tribal bingo ordinance was to collect money "for the support of programs to promote the health, education and general welfare of the Barona Tribe" as stated by the Court of Appeals, this purpose could be conducted within the limits of the California Constitution and existing California law establishing the public policy of this State. However, the true purpose of the creation of a bingo operation on the Barona Indian Reservation results in the establishment of a large-scale money making gambling business for purposes other than charity. The true intent and purpose of the bingo operation

is shown in the management agreement between the Barona Group and the contractor, which engages the contractor for a twenty-five year period to operate the bingo activity on the Reservation and receive as a management fee forty-five percent (45%) of the net operating profits for each fiscal year. (Management Agreement, §§ 1, 3(a).) Such an operation is without question inconsistent with California public policy.

We emphasize the dissenting opinion in *Seminole Tribe of Florida* v. *Butterworth,* 658 F.2d 310, 317 (5th Cir. 1981), cert. denied 102 S.Ct. 1717 (1982), which recognized the "public policy" of Florida as prohibiting bingo for purposes other than charity and that the precise kind of bingo operation sought to be conducted, a large-scale money making gambling business, was prohibited by the public policy of Florida.

In *United States* v. *Farris,* 624 F.2d 890, 894 (9th Cir. 1980), cert. denied 449 U.S. 1111 (1981), the Ninth Circuit concluded that 18 U.S.C. § 1955, prohibiting illegal gambling businesses, applied to Indian Reservations and held that ". . . Congress did not intend Indians could freely engage in the large-scale gambling business that it forbade to all other citizens." But the Court of Appeals here misapplied the *Farris* decision as to what is the public policy of California and with this decision allows the Barona Group, and all other Indian groups and/or tribes in this and all other states, to engage in money making gambling businesses on Reservation land. This activity is prohibited to the citizens of this State and should also be prohibited to Indians and non-Indians acting on their behalf on Reservation land. As stated in *United States* v. *Farris,* 624 F.2d 890, 894:

> ". . . Casinos on Indian land would defeat or endanger the federal interests of protecting interstate commerce and pre-

venting the takeover of legitimate organizations by organized crime. We think the following passage from *United States* v. *Montana* bears repeating:

> 'We must recognize that in this case, as in others in which we are required to fix the rights and powers of Indians in the latter part of the twentieth century in the light of treaties of an earlier century, our task is to keep faith with the Indian while effectively acknowledging that Indians and non-Indians alike are members of one Nation. Both seek power and gain through identical processes, *viz.* commerce, politics, and litigation. We must, however, live together, a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful to neither Indians or non-Indians.' "

Since the public policy of California prohibits the type of gambling business conducted, bingo for purposes other than charitable, and since large-scale gambling is dangerous to Federal interests wherever it occurs, then the activity here is a clear violation of the Federal law, 18 U.S.C. § 1955. As concluded in *United States* v. *Farris,* 624 F.2d 890, 896 (9th Cir. 1980), cert. denied 449 U.S. 1111 (1981):

> "In this Circuit, 'the immunity of Indian use of trust property from state regulation [is] based on the notion that trust lands are a Federal instrumentality held to effect the Federal policy of Indian advancement.' *Santa Rosa Band of Indians* v. *Kings County,* 532 F.2d 655, 666 (9th Cir. 1975), cert. denied, 429 U.S. 1038, 97 S.Ct. 731, 50 L.Ed.2d 748 (1977). Under this view, it would be most inappropriate for immunity from, state regulation to *defeat* the federal policies of opposition to large-scale gambling, protection of legitimate organizations from organized-crime infiltration, and promotion of the welfare of Indians. Therefore, we hold that § 1955 extends even to Indians on Indian lands who are immune from state law, . . .".

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

DATED: MAR 17 1983

Respectfully submitted,

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(Filed and entered December 20, 1982, Phillip B. Winberry, Clerk, U.S. Court of Appeals)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, SAN DIEGO COUNTY, CALIFORNIA, *Plaintiff-Appellant,* v. JOHN F. DUFFY, the Sheriff of San Diego County, California, *Defendant-Appellee.*	No. 82-5408 DC No. CIV 81-710 JNK OPINION

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding
Argued and Submitted November 5, 1982

Before: GOODWIN, HUG, and BOOCHEVER, Circuit Judges.
BOOCHEVER, Circuit Judge:

Barona Group of the Capitan Grande Band of Mission Indians ("Barona") filed suit requesting declaratory and injunctive relief from the enforcement against them of certain county and state laws pertaining to the operation of bingo games by John Duffy, the Sheriff of San Diego County, California (the County). Summary judgment was entered for the County on March 26, 1982, and Barona has appealed. We reverse.

FACTS

Barona is an independent Indian Nation recognized by federal statute with its reservation in the County of San Diego. Act of

February 28, 1919, Pub. L. No. 299, 40 Stat. 1206 *amended by* 47 Stat. 146 (1932). On April 20, 1981, the Tribal Council of the Barona Tribe, the Tribe's governing body, enacted a Tribal Ordinance authorizing, with certain restrictions, the playing of bingo within the reservation. The Tribe subsequently entered into a management agreement with American Amusement Management, Inc., to commence a bingo operation within the reservation.

On June 25, 1981, the undersheriff of the County informed representatives of Barona that the bingo ordinance of the County of San Diego prohibited the Tribe's bingo operation. The undersheriff also said that the ordinance would be enforced to the extent of entry on Indian territory to cite or arrest the participants in the bingo operation. The Tribe then sought injunctive and declaratory relief against the Sheriff on the ground that the Sheriff is without lawful authority to enforce the state or county laws regarding bingo on the Barona Reservation.[1]

STANDARD OF REVIEW

In reviewing a grant of summary judgment, our task is identical to that of the trial court. *State ex rel. Edwards v. Heimann*, 633 F.2d 886, 888 n.1 (9th Cir. 1980). Viewing the evidence *de novo*, in the light most favorable to the party against whom summary judgment is granted, we must determine whether the trial court correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. *Heiniger v. City of Phoenix*, 625 F.2d 842, 843 (9th Cir. 1980). The present case is suitable for summary judgment be-

1. The trial court determined that a case or controversy did exist and we agree. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297-98 (1979).

cause there is no genuine issue of material fact. We reverse, however, on the basis of the legal issues involved.

DISCUSSION

I.

Statutes Involved

The California legislature, in accordance with state constitutional limitations,[2] adopted Cal. Penal Code § 326.5 (West Supp. 1982) which controls the conduct of bingo games. This statute removes from the general prohibition of various forms of gambling the conduct of bingo games pursuant to city or county ordinance as provided in the California Constitution. The County passed such an ordinance allowing bingo games conducted by certain charitable organizations. Barona contends that these provisions do not apply to them because the state and county lacked a grant of power from the federal government to impose or enforce these laws within the confines of the reservation. The County contends that such power is granted under the Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (commonly known as "Public Law 280").

Public Law 280 does provide some applicability of state law over on-reservation activities. Section 4, codified at 28 U.S.C. § 1360, grants states civil jurisdiction over Indian reservations in words that on the surface seem to make all state laws of general

2. Article IV, § 19 of the California State Constitution states:

(a) The Legislature has no power to authorize lotteries and shall prohibit the sale of lottery tickets in the State.

. . . .

(c) Notwithstanding subdivision (a), the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes.

application effective.[3] The Supreme Court, however, has construed this section to mean that states have jurisdiction only over private civil litigation involving reservation Indians in state court. *Bryan v. Itasca County*, 426 U.S. 373, 385 (1976). Thus, a state may not impose general civil/regulatory laws on the reservation. Section 2 of Public Law 280, codified at 18 U.S.C. § 1162,[4] however, confers on certain states, including California, full criminal jurisdiction over offenses committed by Indians on the reservation. Thus, whether the state and county laws apply to the Tribe's bingo enterprise depends on whether the laws are classified as civil/regulatory or criminal/prohibitory.

II.

The Case law

We addressed this issue in *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977). In that case, members of the Puyallup Indian Tribe were convicted for possessing certain unmarked and

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3. Section 4(a), as codified at 28 U.S.C. § 1360(a) (1976), provides:

> (a) Each of the States . . . listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the state . . .:
>
> . . . .
>
> California . . . . . All Indian country within the State.

4. Section 2(a), as codified at 18 U.S.C. § 1162(a) (1976), provides:

> (a) Each of the States . . . listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . ., and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State. . . .
>
> . . . .
>
> California . . . . . All Indian country within the State.

unclassified fireworks in violation of Washington State Law. The court was construing the Assimilative Crimes Act, 18 U.S.C. §§ 13, 1152 (1976). That Act was held to have incorporated the general criminal laws of a state, but not the civil/regulatory laws. *Marcyes,* 557 F.2d at 1364. In determining that the Washington law was prohibitory rather than regulatory, the court said:

> Even though the Washington scheme allows for limited exceptions (i.e., public displays, . . . movies, . . .), its intent is to prohibit the general possession and/or sale of dangerous fireworks and is not primarily a licensing law.
>
> The possession of fireworks is not the same situation encountered in other regulatory schemes such as hunting or fishing, where a person who wants to hunt or fish merely has to pay a fee and obtain a license. The purpose of such statutes is to regulate the described conduct and to generate revenues. In contrast, the purpose of the fireworks laws is not to generate income, but rather to prohibit their general use and possession in a legitimate effort to promote the safety and health of all citizens. Moreover, by allowing appellants to operate their stands on the reservation or in any federal enclave would entirely circumvent Washington's determination that the possession of fireworks is dangerous to the general welfare of its citizens.

Marcyes, 557 F.2d at 1365. We are confronted with the question of whether the County's bingo laws are similarly prohibitory.

The Fifth Circuit has recently distinguished *Marcyes* in determining the scope of Public Law 280 jurisdiction to facts almost identical to the present case. We find *Seminole Tribe of Florida v. Butterworth,* 658 F.2d 310 (5th Cir. 1981), *cert. denied,* 102 S.Ct. 1717 (1982), persuasive. In *Butterworth,* like the present case, pursuant to a state constitutional grant of power, the state statute excepted bingo operations by certain charitable organizations and under certain conditions from a general prohibition of

gambling.[5] The Fifth Circuit determined that whether a statute may be classified as regulatory or prohibitory depended on whether the legislature deemed the activity to be against the public policy of the state. Evaluating the statute, the court determined that the legislature meant only to regulate bingo. The court based this determination on the fact that bingo is allowed in Florida as a form of recreation, that certain worthy organizations are allowed to benefit from bingo and that the state regulates bingo halls only to prevent the game of bingo from becoming a money-making venture. 658 F.2d at 314-15. *Marcyes* was distinguished on the basis that the *Marcyes* court had found that possession of dangerous fireworks was "generally" prohibited and not merely licensed. This evidenced Washington's public policy against dangerous fireworks.

Another Ninth Circuit case, *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981), gives additional support for the "public policy" test. In *Farris*, the court was considering whether the provisions of the Organized Crime Control Act of 1970, 18 U.S.C. § 1955 (1976), could apply to gambling on the Puyallup Indian reservation. The court found that the "violation of the law of state" requirement of § 1955

5. When the Florida statute was first enacted, it contained no sanctions for its violation. The court recognized in a footnote that this arguably indicates a legislative intent that the statute be construed as regulatory. *Butterworth*, 658 F.2d at 314 n.6. The district court in the present case placed heavy emphasis on this factor in distinguishing the *Butterworth* case. It is clear from the text of the *Butterworth* opinion, however, that the Fifth Circuit did not rely heavily on the presence of penal sanctions in classifying the statute. *Butterworth*, 658 F.2d at 314; *see also Marcyes*, 557 F.2d at 1364 (state not allowed to enforce regulatory system on Indian reservation by making criminal failure to comply with regulations). Rather, that court relied on a consideration of a "public policy" test developed from Ninth Circuit cases. Moreover, criminal sanctions had been enacted before the *Butterworth* case was filed, so that the provisions considered by the Fifth Circuit were essentially the same as those of the County's ordinance.

was intended to include in the federal prohibition those gambling operations contrary to state public policy, as was the Puyallup gambling. Based on this analysis, the *Butterworth* court concluded that the state's public policy determines whether the activity is prohibited or regulated.

The scope of Public Law 280 as applied to bingo games is also addressed in *Oneida Tribe of Indians v. Wisconsin,* 518 F.Supp. 712 (W.D. Wis. 1981). In *Oneida* the district court was confronted with a factual situation and state statutory scheme virtually identical to those found in *Butterworth.* Using what it called a *Marcyes/Butterworth* analysis, the *Oneida* court also determined that the bingo laws were regulatory and not prohibitory. The court rested its decision primarily on the fact that the Wisconsin statute only provided penalties for operation of bingo games not in accordance with the statute. The general populace was allowed to *play* at will. Thus, the court reasoned that bingo was not contrary to public policy.

Although the test for determining when a state statutory scheme such as the present one should apply to tribal members on their reservation is not susceptible of easy application, we conclude for a number of reasons that the County's bingo laws are regulatory and of a civil nature.

First, the state statute authorizes bingo operations by tax exempt organizations including, for example, fraternal societies, recreational clubs, senior citizen organizations, real estate boards and labor and agricultural groups. Cal. Penal Code § 326.5(a) (West Supp. 1982). There is no general prohibition against playing bingo as there was against fireworks in *Marcyes.* As in *Butterworth,* the California statute regulates bingo as a money making venture by limiting size of prizes, requiring that all pro-

ceeds be applied to charitable purposes, and requiring that the game be operated by volunteers from the authorized organization. The fact that so many diverse organizations are allowed to conduct bingo operations, albeit under strict regulation, is contrary to a finding that such operations violate California public policy.

Second, as was pointed out in the *Oneida* case, the general public is allowed to play bingo at will in an authorized game. This cuts against a public policy prohibition.

Third, the Supreme Court has laid down several rules of construction applicable to statutes affecting Indian affairs which undercut application of the bingo laws in this case. Ambiguities in statutes concerning dependent tribes are to be resolved in favor of the Indians. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 208 n.17 (1978); *Bryan v. Itasca County,* 426 U.S. 373, 392 (1976). State jurisdiction over reservations, historically, is strongly disfavored. *Bryan,* 426 U.S. at 376 n.2; *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 168 (1973). Moreover, enforcement of the bingo laws is contrary to the present federal policy of encouraging tribal self-government. *See United States v. Wheeler,* 435 U.S. 313, 322-26 (1978); *Bryan,* 426 U.S. at 388-89 n.14; *see also* the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* (1976); Civil Rights Act of 1968, Title IV, 25 U.S.C. §§ 1321-1326 (1976) (requiring tribal consent to further state assumption of jurisdiction under Public Law 280). The decisions addressing similar bingo statutes have acknowledged the closeness of the question, but have found in favor of the reservation Indians on the basis of these strong policies.

Finally, the stated purpose of the tribal bingo ordinance is to collect money "for the support of programs to promote the health, education and general welfare" of the Barona Tribe. This

intent to better the Indian community is as worthy as the other charitable purposes to which bingo proceeds are lawfully authorized under the California statute. Although the Barona bingo operation does not fully comply with the letter of the statutory scheme, it does at least fall within the general tenor of its permissive intent.[5]

III.

The Federal Organized Crime Control Act

Appellee argues that it can prohibit the tribal bingo operation under federal law, regardless of whether the state laws are civil or criminal, by reliance on the Organized Crime Control Act of 1970, 18 U.S.C. § 1955 (1976). This federal law incorporates by reference certain state gambling laws and makes the violation of the state provisions a federal offense.

In *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981), we held that whether a tribal activity is "a violation of the law of a state" within the meaning of § 1955 depends on whether it is contrary to the "public policy" of the state. *Id.* at 895-96. Thus, *Farris* makes co-extensive the tests for application of state law to Indian reservations under § 1955 and for direct application of state law under Public Law 280. Because we have concluded that bingo games are not contrary to the public policy of California, the activity is not violative of § 1955.

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5. The trial court emphasized that the statutory scheme is not for the purpose of licensing or raising revenue. But as the *Butterworth* court recognized, "[r]egulation may appear in forms other than licensing, and the fact that a form of gambling is self-regulated as opposed to state-regulated through licensing does not require ruling that the activity is prohibited." 658 F.2d at 315. Further, zoning laws do not license and do not raise revenue, but have been held regulatory and inapplicable to Indian reservations. *United States v. County of Humboldt*, 615 F.2d 1260 (9th Cir. 1980).

The summary judgment is reversed and the case is remanded for the purpose of entering judgment for Barona.

REVERSED and REMANDED.

18 USC § 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property

in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

28 USC § 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the Territory
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

18 USC § 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, book-making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person

in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Cal. Const., Art. IV. Lotteries; horse races, horse race meetings and bingo games

Sec. 19. (a) The Legislature has no power to authorize lotteries and shall prohibit the sale of lottery tickets in the State.

(b) The Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results.

(c) Notwithstanding subdivision (a), the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes.

Cal. Penal Code § 326.5. Bingo games for charity

(a) Neither this chapter nor Chapter 10 (commencing with Section 330) applies to any bingo game which is conducted in a city, county, or city and county pursuant to an ordinance enacted

under Section 19 of Article IV of the State Constitution, provided that such ordinance allows games to be conducted only by organizations exempted from the payment of the bank and corporation tax by Sections 23701a, 23701b, 23701d, 23701e, 23701f, 23701g, and 23701*l* of the Revenue and Taxation Code and by mobilehome park associations and senior citizens organizations; and provided that the receipts of such games are used only for charitable purposes.

(b) It is a misdemeanor for any person to receive or pay a profit, wage, or salary from any bingo game authorized by Section 19 of Article IV of the State Constitution. Security personnel employed by the organization conducting the bingo game may be paid from the revenues of bingo games as provided in subdivisions (j) and (k).

(c) A violation of subdivision (b) of this section shall be punishable by a fine not to exceed ten thousand dollars ($10,000), which fine shall be deposited in the general fund of the city, county, or city and county which enacted the ordinance authorizing the bingo game. A violation of any provision of this section, other than subdivision (b), is a misdemeanor.

(d) The city, county, or city and county which enacted the ordinance authorizing the bingo game may bring an action to enjoin a violation of this section.

(e) No minors shall be allowed to participate in any bingo game.

(f) An organization authorized to conduct bingo games pursuant to subdivision (a) shall conduct a bingo game only on property owned or leased by it, or property whose use is donated to the organization, and which property is used by such organiza-

tion for an office or for performance of the purposes for which the organization is organized. Nothing in this subdivision shall be construed to require that the property owned or leased by or whose use is donated to the organization be used or leased exclusively by or donated exclusively to such organization.

(g) All bingo games shall be open to the public, not just to the members of the authorized organization.

(h) A bingo game shall be operated and staffed only by members of the authorized organization which organized it. Such members shall not receive a profit, wage, or salary from any bingo game. Only the organization authorized to conduct a bingo game shall operate such game, or participate in the promotion, supervision, or any other phase of such game. This subdivision does not preclude the employment of security personnel who are not members of the authorized organization at such bingo game by the organization conducting the game.

(i) No individual, corporation, partnership, or other legal entity except the organization authorized to conduct a bingo game shall hold a financial interest in the conduct of such bingo game.

(j) With respect to organizations exempt from payment of the bank and corporation tax by Section 23701d of the Revenue and Taxation Code, all profits derived from a bingo game shall be kept in a special fund or account and shall not be commingled with any other fund or account. Such profits shall be used only for charitable purposes.

(k) With respect to other organizations authorized to conduct bingo games pursuant to this section, all proceeds derived from a bingo game shall be kept in a special fund or account and shall not be commingled with any other fund or account. Proceeds are

the receipts of bingo games conducted by organizations not within subdivision (j). Such proceeds shall be used only for charitable purposes, except as follows:

(1) Such proceeds may be used for prizes.

(2) A portion of such proceeds, not to exceed 20 percent of the proceeds before the deduction for prizes, or one thousand dollars ($1,000) per month, whichever is less, may be used for rental of property, overhead, including the purchase of bingo equipment, administrative expenses, security equipment, and security personnel.

(3) Such proceeds may be used to pay license fees.

San Diego County Code of Regulatory Ordinances

CHAPTER 3
BINGO AND SIMILAR GAMES

Sec. 37.301. PROHIBITED GAMES. It shall be unlawful for any person to set up, manage, conduct or maintain any game, machine or enterprise wherein:

(a) A consideration is paid by the player;

(b) Prizes are awarded as determined by skill or by any combination of skill and chance; and

(c) Said game, machine or enterprise is played concurrently with or alternately or in conjunction or connection with:

(1) Any lottery;

(2) Any game of chance, whether or not a consideration is paid for playing the game of chance.

Sec. 37.302. (Repealed by Ord. No. 4863 (N.S.) Eff. 3-31-77)

Sec. 37.303. **FREE GAMES AS ENTICEMENT PROHIBITED.** It shall be unlawful for any person to set up, manage, conduct or maintain any combination of games, machines or enterprises wherein games of chance and games of skill are alternated or played in any sequence with each other so that free games are used to entice or allure players into the playing for a consideration of paid games of skill or paid games combining the element of chance with the element of skill.

Sec. 37.304. **SPECIFIC GAMES PROHIBITED.** This chapter is intended to prohibit the playing of "bingo", "tango", "bridgo", "skill ball" or any game or combination of games similar in operation to such games, and to apply to free as well as to paid playing of such games.

Sec. 37.305. **BINGO AUTHORIZED.** Notwithstanding any other provisions of this Chapter, this ordinance is adopted pursuant to section 19 of Article IV of the California Constitution in order to make the game of bingo lawful under the terms and conditions in the following sections of this Chapter.

Sec. 37.306. **DEFINITIONS.** Whenever in this chapter the following terms are used they shall have the meanings respectively ascribed to them in this section.

(a) Bingo is a game of chance in which prizes are awarded on the basis of designated numbers or symbols on a card which conform to numbers or symbols selected at random. The game of bingo shall also include cards having numbers or symbols which are concealed and preprinted in a manner providing for distribution of prizes. The winning cards shall not be known prior to the game by any person participating in the playing or

operation of the bingo game. All such preprinted cards shall bear the legend for sale or use only in a bingo game authorized under California law and pursuant to local ordinance.

(b) Authorized organization is an organization exempted from the payment of the bank and corporation tax by Section 23701a, 23701b, 23701d, 23701e, 23701f, 23701g, or 23701l of the Revenue and Taxation Code. Authorized organization also includes a senior citizens organization and a mobilehome park association.

(c) Minor is any person under the age of eighteen (18) years.

Sec. 37.307. **LICENSE.** A license shall only be issued to a person who is a member of an authorized organization and is acting on behalf of such authorized organization. The procedure to follow, except as otherwise herein provided, in obtaining a license is that set forth in the Uniform Licensing Procedure Sections 16.101-16.115.

Sec. 37.308. **APPLICATION-CONTENTS.** The applications shall be filed not less than ten days prior to the proposed date of the bingo game or games. Such application form shall require from the applicant at least the following:

(a) A list of all members who will operate the bingo game, including full names of each member, date of birth, place of birth, physical description and driver's license number.

(b) The date(s) and place(s) of the proposed bingo game or games.

(c) Proof that the organization is an authorized organization as defined in this chapter.

Sec. 37.309. TERM OF LICENSE AND FEES. The term of a bingo license is one (1) year.

The fee for a bingo license shall be fifty dollars ($50), twenty-five ($25) of which shall be refunded if the application for license is denied. An additional fee of one percent (1%) of the monthly gross receipts over five thousand dollars ($5,000) derived from bingo games shall be collected monthly by the Issuing Officer.

Sec. 37.310. (Repealed by Ord. No. 5200 (N.S.) Eff. 8-10-78).

Sec. 37.311. (Repealed by Ord. No. 5200 (N.S.) Eff. 8-10-78).

Sec. 37.312. LIMITATIONS. An authorized organization shall conduct a bingo game only on property that has been owned or leased by it or on property whose use has been donated to the organization for a period of not less than twelve (12) months immediately preceding the filing of an application to conduct bingo, and which property is used by such organization for an office or for the performance of the purposes for which the organization is organized. Nothing in this section shall be construed to require that the property owned or leased by or whose use is donated to the organization be used or leased exclusively by or donated exclusively to such organization.

(a) No minors shall be allowed to participate in any bingo games.

(b) All bingo games shall be open to the public, not just to the members of the authorized organization.

(c) A bingo game shall be operated and staffed only by members of the authorized organization. Such members shall be approved by the Sheriff. If, after the license has been issued, the authorized organization submits additional names to the Sheriff for approval, the application for approval shall be accompanied by a fee of five dollars ($5.00) for each name, no part of which shall be refundable, and which shall be used to defray the cost of investigation. Such members shall not receive a profit, wage or salary from any bingo game. Only the organization authorized to conduct a bingo game shall operate such game or participate in the promotion, supervision or any other phase of such game. This section does not preclude the employment of security personnel who are not members of the authorized organization at such bingo game by the organization conducting the game.

(d) No individual, corporation, partnership, or other legal entity except the organization authorized to conduct a game shall hold a financial interest in the conduct of such bingo game.

(e) With respect to organizations exempt from payment of the bank and corporation tax by Section 23701d of the Revenue and Taxation Code, all profits derived from a bingo game shall be kept in a special fund or account and shall not be commingled with any other fund or account. Such profits shall be used only for charitable purposes. With respect to other organizations authorized to conduct bingo games, all proceeds derived from a bingo game shall be kept in a special fund or account and shall not be commingled with any other fund or account. Such proceeds shall be used only for charitable purposes, except as follows:

(1) Such proceeds may be used for prizes.

(2) A portion of such proceeds, not to exceed twenty

percent (20%) of such proceeds before the deduction for prizes, or one thousand ($1,000) dollars per month, whichever is less, may be used for the rental of property, overhead, including the purchase of bingo equipment, administrative expenses, security equipment and security personnel.

(3) Such proceeds may be used to pay license fees.

Within thirty (30) days after the bingo game is held the applicant will file with the Sheriff a full and complete financial statement of all monies collected, disbursed and the amount remaining for charitable purposes.

(f) No person shall be allowed to participate in a bingo game unless the person is physically present at the time and place in which the bingo game is being conducted.

(g) The total value of prizes awarded during the conduct of any bingo games shall not exceed two hundred fifty dollars ($250) in cash or kind, or both, for each separate game which is held.

(h) No bingo game shall be conducted between the hours of midnight and 8:00 a.m.

(i) The licensee may conduct bingo on not more than three (3) days during any seven (7) day period. Once during each year the Issuing Officer may permit a licensee to conduct bingo games for more than three (3) days during any seven (7) day period, provided that such permission shall be limited to bingo games which will be conducted in conjunction with an established annual event regularly held by the licensee.

Sec. 37.313. INSPECTION. Any peace officer of the County shall have free access to any bingo game licensed under this

chapter. The licensee shall have the bingo license and lists of approved staff available for inspection at all times during any bingo game.

Sec. 37.314. (Repealed by Ord. No. 5290 (N.S.) Eff. 11-30-78).

Sec. 37.315. (Repealed by Ord. No. 5200 (N.S.) Eff. 8-10-78).

Sec. 37.316. **VIOLATION AND PENALTIES.**

(a) It is unlawful for any person to receive a profit, wage or salary from any bingo game authorized by this chapter.

(b) Any person violating any of the provisions or failing to comply with any of the requirements of this chapter shall be guilty of a misdemeanor and upon conviction thereof, shall be punishable by a fine not to exceed five hundred dollars ($500) or by imprisonment in the County jail for a period of not more than six (6) months or by both such fine and imprisonment.

All sanctions provided herein shall be cumulative and not exclusive.

Sec. 37.317. **SEVERABILITY.** If any provision, clause, sentence, or paragraph of this chapter or the application thereof to any person or circumstances shall be held invalid, such invalidity shall not affect the other provisions of applications of the provisions of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are hereby declared to be severable.

No.....

IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1982

JOHN F. DUFFY, the Sheriff of San Diego County, California,
Petitioner,

v.

THE BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, SAN DIEGO COUNTY, CALIFORNIA,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March 1983, three copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed, postage prepaid, to Harrison W. Hertzberg, Esq., HERTZBERG & HERTZBERG, 3550 Wilshire Boulevard, Suite 1418, Los Angeles, CA 90010, Counsel for the Respondent. I further certify that all parties required to be served have been served.

JOSEPH KASE, JR., County Counsel (Acting)
County of San Diego
355 County Administration Center
San Diego, CA 92101
Telephone: (619) 236-3651
Attorney for Petitioner

No. 82-1556

IN THE

Supreme Court of the United States

October Term, 1982

JOHN DUFFY, The Sheriff of San Diego County, California,
Petitioner,

vs.

THE BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, SAN DIEGO COUNTY, CALIFORNIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

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Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented.

Are California's Bingo laws of a civil/regulatory nature within the meaning of Public Law 280 so that the Barona Indian Tribe may regulate its Bingo affairs on Indian Country pursuant to its ordinance free of state regulation?

Parties to the Proceedings.

This litigation was commenced by the filing of a complaint for declaratory and injunctive relief. Petitioner is John F. Duffy, Sheriff of the County of San Diego. Respondent is Barona Group of the Capitan Grande Band of Mission Indians, San Diego County, California.

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No. 82-1556

IN THE

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THE BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, SAN DIEGO COUNTY, CALIFORNIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 694 F.2d 1185 and is reprinted as Appendix A, and is repeated as Appendix A in Petitioner's Petition for Writ of Certiorari.

Jurisdiction.

The judgment of the Court of Appeals was entered on December 20, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutes Involved.

The pertinent Federal statutes involved are Public Law 280 codified as 18 U.S.C. §1162 and 28 U.S.C. §1360.

The pertinent State provisions involved are California Constitution, Article IV, §19; California Penal Code §326.5;

and San Diego County Code of Regulatory Ordinances, §§37.101-37.317. Both State and Federal statutory provisions are set out in Appendix B of Petitioner's Petition for Certiorari.

Statement of the Case.

Petitioner's Petition for Writ of Certiorari does not state fully all of the relevant facts in this case.

It is true that on April 20, 1981, the Tribe Council of the Barona Group enacted a tribal ordinance authorizing the playing of Bingo within the reservation. That tribal ordinance and management agreement provided in relevant part:

1. That the Barona Indian Group of the Mission Indian Tribe is a non-profit organization engaged in charitable, civic, community, benevolent, religious and scholastic work;

2. That the contractor with whom the Tribe contracted to manage the Bingo would operate same for the Tribe;

3. The Tribe's proceeds derived from Bingo *shall* be used for the support of programs "to promote the health, education and general welfare of its people". (Emphasis added).

4. It shall be unlawful for anyone to perform, conduct or operate Bingo on Indian Country except for the Tribe;

5. Bingo may be conducted every day of the week at the discretion of the Tribe;

6. All persons involved in the conduct of the games must be bona fide employees of the Tribe or contractor;

7. No one under the age of 18 shall be allowed to play Bingo;

8. Contractor shall give first preference to qualified members of the Tribe in hiring personnel;

9. Contractor to invest the necessary cost for construction of a facility to operate the Bingo Enterprise, which shall become the property of the Tribe.

While the Barona Group's Ordinance does not comply precisely with the San Diego Ordinance in that it set no limit on prize money for any single game, the San Diego Ordinance permits the same result by not limiting the number of games that may be played. While the Barona Group's Ordinance does not set time limits for hours of operation, the Barona Bingo establishment has not yet opened, hence, its hours of operation cannot be determined.

The Barona Ordinance requires that it be staffed by tribal members. First preference must be given to such members by contractor when hiring personnel. This hiring preference provision has in fact resulted in hiring only tribal members to operate the entire enterprise, and most of them have been out of work for the past two years.

Though the state law does not permit any person to receive a wage or salary from any Bingo games (other than security personnel), the Barona Ordinance and Management Agreement requires the hiring of tribal members and permits payment of a reasonable wage to all such employees.

The Barona Indian Bingo Enterprise will open to the public on April 15, 1983, in the Barona Tribal Community Center. Though contractor will invest the funds for the permanent facility, the Tribe shall have the first right of refusal to furnish the labor for such construction.[1]

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[1]The President in his Indian Policy message of January 24, 1983, stated the administration intends to restore tribal governments to their rightful place among the governments of this nation . . . "to resume control over their own affairs." To that end, the President states:

> "It is the policy of this administration to encourage private involvement, both Indian and non-Indian, in tribal economic development. In some cases, tribes and the private sector have already taken innovative approaches which have overcome the legislative and regulatory impediments to economic progress."

The President further stated that tribal governments should have the primary responsibility for meeting the needs and desires of their citizens and further that it is important that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of self-government. *Weekly Compilation of Presidential Documents*, Vol. 19, No. 4, page 98.

REASONS WHY THE WRIT SHOULD BE DENIED.

1. Neither the Decision Below, nor the Record, Raises the Question Presented in the Petition.

(a) Petitioner contends the question presented in the Petition is whether an Indian Bingo operation conducted on the reservation as a money making gambling business is contrary to California public policy. The issue presented to the Ninth Circuit was whether California public policy concerning legalized Bingo was civil/regulatory on the one hand or criminal/prohibiting on the other.

Petitioner's question assumes that only an Indian Bingo operation is conducted as a money making gambling business while all of the other 130 Bingo operations in San Diego County are not so operated.[2] If Bingo is gambling, it is no less gambling at the American Legion Hall than it is on Indian Country. If the Bingo receipts exceed the prizes plus expenses, that excess is money made whether it occurs at the American Legion Hall or on the Barona Reservation. If the American Legion uses the excess to run a child care day center then its child care day center is the result of a money making gambling business no differently than one run by the Barona Tribe from its Bingo Excess. The only difference between the two is that the American Legion has its private capital to create the operation, while the Indians "must encourage private involvement."

(b) Since the Barona Bingo operation has not yet opened for business, the record certainly cannot support Petitioner's position. At this point in time it cannot be said that it is a money making operation.

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[2]The Bingo Bugle (San Diego Edition), March, 1983, listed 130 Bingo Programs Weekly with as many as 23 on any one evening. This only includes their advertisers. Investigation reveals there are many more.

2. The Barona Tribe Has a Right to Regulate Its Own General Civil Affairs.

(a) This Court has held that Public Law 280, codified as 18 U.S.C. §1162 and 28 U.S.C. §1360 was primarily intended to "redress the lack of Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the Courts of the States to decide such disputes." *Bryan v. Itasca County*, 426 U.S. 373 at 383; 96 S.Ct. 2102 at 2108. This Court, after further discussion, concluded that "if Congress in enacting Public Law 280 had intended to confer upon the States general civil/regulatory powers, including taxation of reservation Indians, it would have expressly said so." *Id.* at 390, 96 S.Ct. at 2111.

(b) The California Supreme Court has held that when an enactment follows voter approval, the ballot summary, arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language. *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208, 245; 149 Cal. Rptr. 239, 583 P.2d 1281 (1978). Appendix "A" is California Voters Pamphlet of the Primary Election of June 8, 1976, containing summary, arguments and analysis presented to the electorate. California's Bingo policy stems from a Constitutional Amendment; California Constitution, Article XVIII, §§1 and 4, permitting enactment after passage by a two-thirds majority of both the Senate and Assembly and popular vote of the people.[3]

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[3]The People of the State of California, by an overwhelming majority of 70.2% voted in Proposition No. 9 (Bingo) on June 8, 1976. "Statement of Voters" — June 8, 1976. Primary Election, compiled by the Secretary of State, pursuant to California Elections Code §17121 at page 43.

The arguments made against Proposition 9, *i.e.*, corruption, failure to provide for licensing, failure to provide regulation of advertising, exorbitant salaries, distribution of profits, threat to crime-free society, aggressive organizations promote Bingo and reap a fortune, a no vote will discourage other forms of legalized gambling, immoral environment, etc. were all made in the California Voters Pamphlet. The argument in favor of the passage of Proposition 9 centered around the fact that Bingo is played "illegally daily" and passage would allow people to "play Bingo legally." This is a reflection of the intent of the People of California to legalize that which had previously been prohibited.

(c) Existing California law permits Bingo to be played by any labor, agriculture, or horticultural organization. California Revenue and Taxation Code §23701(a). It permits Bingo to be played in any lodge, by a fraternal society, or in any fraternal society providing for the payment of life, sickness, accident, or other benefits to members of such society. California Revenue and Taxation Code §23701(b). It permits Bingo to be played by corporations, community chests, or trusts organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, educational, fostering national or international sports, and prevention of cruelty to children or animals. California Revenue and Taxation Code §23701(e). It permits Bingo to be played by civic leagues, and organizations operated exclusively for the promotion of social welfare or local organizations of employees. California Revenue and Taxation Code §23701(g). It permits Bingo to be played by domestic, fraternal societies, orders, or associations operating under the lodge system. California Revenue and Taxation Code §23701(*l*). It allows Bingo to be played by mobile home park associations and senior citizens organizations. True,

that the profits of such games can be used only for charitable purposes, but as the Ninth Circuit Court of Appeals stated, the Barona Indian Tribe is no less a worthy charity than the above.

(d) The San Diego Ordinance itself states in §37.305 "Bingo Authorized" (Appendix B of Petition herein), that ". . . this Ordinance is adopted pursuant to §19 of Article IV of the California Constitution in order to make the game of *Bingo lawful* under the terms, conditions, and the following sections of this Chapter." (Emphasis added).

(e) Bingo in California is regulatory and not prohibitory because penalties are provided only when the Bingo games are not operated in accordance with the statute. A fine is provided in California Penal Code §326.5(c) only if any person receives or pays a profit, wage, or salary from any Bingo game. No other penalty is provided unless for a failure to operate the Bingo game in accordance with that section of the Penal Code.

3. Present Federal Policy Favors the Barona Indians.

Argument is made by Petitioner that there exists a clear violation of Federal Law. 18 U.S.C. §1955; *United States v. Farris*, 624 F.2d 890, 896 (9th Cir. 1980); *cert. denied*, 449 U.S. 1111 (1981).

The Justice Department has proposed a revision of the Federal Criminal Code and, in particular, a section that would have given states control of this conduct on Indian reservations. It would have added new §1166 to Title 18 U.S.C. as Part J of the proposed revision. Attached as Appendix B. However, same has been withdrawn and deleted from the provision revision, indicating an intent on

the part of the administration to protect this kind of revenue producing enterprise for the Indian.[4]

Conclusion.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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HARRISON W. HERTZBERG,
ROBERT MYLES HERTZBERG,
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The Barona Group of the
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California.

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[4]*Indian News Notes* (Bureau of Indian Affairs), Vol. 7, No. 9, March 18, 1983, which reads as follows:

"*Proposal to Give States Control of Reservation Gambling Deleted:*"

"The intervention of Interior Secretary James Watts at the White House helped bring about the deletion, from a proposed revision of the Federal Criminal Code, of a section that would have given states control of gambling on Indian reservations. The proposed new section would have subjected Indian individuals, organizations and tribal governments to state laws with regard to licensing regulation and prohibition of gambling on Indian reservations. The Interior Assistant Secretary for Indian Affairs 'strongly opposed' the proposed new section in a memorandum to the Department's Legislative Counsel. The memorandum described the proposal as 'inconsistent with the President's Indian Policy Statement of January 24' which stressed the Tribe's governmental authority and responsibility on the reservations. The memo also noted the limited revenue-producing resources on reservations and concluded 'this kind of revenue-producing possibility should be protected and enhanced.' "

APPENDIX "A"

CALIFORNIA VOTERS PAMPHLET

June 8, 1976

Primary Election

PROPOSITION 9 BINGO

Ballot Title

BINGO. LEGISLATIVE CONSTITUTIONAL AMENDMENT. Permits Legislature to authorize cities and counties to provide for bingo games, but only for charitable purposes. Financial impact: None on state; nominal fiscal effects on cities and counties.

FINAL VOTE CAST BY LEGISLATURE ON ACA 3 (PROPOSITION 9):

ASSEMBLY—Ayes, 57 Noes, 16

SENATE—Ayes, 27 Noes, 11

Analysis by Legislative Analyst

PROPOSAL:

The Constitution prohibits lotteries in California. Bingo is a form of lottery if the players pay for a chance to win a prize.

This proposal would let the Legislature authorize cities and counties to permit bingo for charitable purposes.

FISCAL EFFECT:

Legislation has been enacted (Chapter 869, Statutes of 1975) which authorizes cities and counties to permit bingo conducted by charitable organizations for charitable purposes. Chapter 869 becomes operative upon adoption of this proposal by the voters.

Under Chapter 869, cities and counties will not receive any revenues from these games, but they may charge a license fee which cannot exceed its issuance cost. As a result, the local fiscal effect will be nominal. There is not state fiscal effect.

Argument Against Proposition 9

Commercialized bingo is big business.

Commercialized bingo is bad business.

Commercialized bingo is corrupting business.

Florida legalized bingo in 1967 and has experienced a flood of problems ever since. A Florida Legislative council report states, "Adoption of the State Bingo Law by the 1967 Legislature unleased a torrent of questionable, if not illegal, gambling activities in Florida."

Iowa legalized bingo in 1973, and has been swamped by serious law enforcement problems. The Iowa Attorney General states that ". . . a dozen high-stake operations have sprung up and are doing a $37 million a year business."

The California Attorney General's Task Force on Legalized Gambling has recommended 8 reasonable safeguards be written into the law, should commercialized bingo come to California. Proposition 9 ignores 4 of these safeguards, including mandatory licensing, statewide standards for regulation and conduct of games, limits on the frequency of games, and a statewide supervisory agency.

Proposition 9 fails to provide for mandatory licensing on bingo operations.

Proposition 9 fails to provide for the regulation of bingo advertising.

Proposition 9 fails to provide reporting and auditing procedures. This failure provides no controls over price of leases, exorbitant salaries, skimming, or the final distribution of bingo profits.

Proposition 9 fails to prohibit individuals with criminal records from running bingo games.

Proposition 9 fails to provide for statewide standards for bingo regulations. This failure will produce a crazy-quilt pattern of different bingo laws among different California cities.

The most glaring fault of Proposition 9 is that it fails to provide for a "Statewide Supervisory Agency." The Attorney General's Task Force on Legalized Gambling made this safeguard their final recommendation. Such an agency would protect California citizens against abuses, would give society a measure of control over gambling, and make bingo operators accountable.

Proposition 9 is a threat to a well-governed, crime-free society.

Many non-profit organizations in California oppose legalizing gambling in order to raise funds for "charity."

If Proposition 9 passes, Californians can brace themselves for a deluge of flamboyant advertising, promoting exotic prizes and a "something-for-nothing"

attitude toward life. Commercialized bingo could well become California's No. 1 headache.

If Proposition 9 passes, an aggressive organization could legally promote and operate bingo on a 24-hour, 7-day-a-week basis and reap a fortune.

Commercialized bingo poses serious social problems—especially among families with marginal incomes. "Grocery money" often ends up in the pockets of bingo operators. Gambling victimizes the poor and elderly.

Proposition 9 is badly written. It contains many loopholes. It will produce no tax revenue for the state.

Bingo does not belong in the California Constitution.

A NO vote on Proposition 9 will refer commercialized bingo back to the state legislature for more careful study and some reasonable safeguards.

A NO vote will discourage other forms of legalized gambling from entering California.

A NO vote will create a better moral environment in which to raise families.

A NO vote will make California a better state in which to live.

ROBERT H. BURKE
Member of the Assembly
73rd District

ALBERT S. RODDA
Member of the Senate
5th District

Rebuttal to Argument Against Proposition 9

The opponents say commercialized Bingo is big, bad, corrupt business. Is Bingo played "illegally" daily throughout California by churches, civic organizations and others big, bad, corrupt business?

The opponents point to a Florida law long since amended and the Iowa law which does not contain all our safeguards. Comparisons without merit. Neither these states nor approximately 26 others are about to give up their legalized Bingo.

The opponents refer to the Attorney General's Task Force on Legalized Gambling neglecting to state its conclusion. After reviewing all states that permitted Bingo the Task Force wrote: (pages 32-33) "The general opinion of both law enforcement and public administration authorities interviewed seems to confer approval on the legalization of Bingo for civic, religious and charitable purposes. On the whole, they felt that a properly regulated and conducted Bingo game presented no law enforcement problems of substance."

The opponents want more bureaucracy; statewide licensing, statewide regulation, limits on frequency of games and statewide supervision. Our Statute provides local control and supervision requiring an ordinance by the City or County before Bingo could be played.

A "no" vote will not prevent Bingo from being played. It is played illegally daily.

A "yes" vote will allow people to play Bingo legally. There will be no commercial profit. All proceeds go to charity.

Finally, opposition arguments concentrate on the Attorney General's Task Force Report—But the Attorney General does not oppose this measure. He has reviewed the Statute and finds no enforcement problems.

LEROY F. GREENE
Member of the Assembly, 6th District

Text of Proposed Law

This amendment proposed by Assembly Constitutional Amendment No. 3 (Statutes of 1975, Resolution Chapter 98) amends an existing section of the Constitution by adding a subdivision thereto. Therefore, the provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED AMENDMENT TO ARTICLE IV, SECTION 19

(c) Notwithanding subdivision (a), the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes.

PROPOSITION 9 BINGO

Argument in Favor of Proposition 9

Proposition 9 deserves your favorable vote. This proposal will add a single sentence to our State Constitution making it possible to play bingo legally provided the proceeds are used for charitable purposes only.

It is presently illegal to play bingo anywhere in California under almost any circumstances.

The enabling act, AB 144 (1975), permits bingo games for charitable purposes where it is authorized by a local ordinance and conducted by nonprofit charitable organizations. All proceeds must be used for charitable purposes. The statute (AB 144) was written to preclude participation by the underworld. The charitable organization running the game must be recognized as a charity and exempt from

taxation by both State and federal government. The games must be conducted by members of the organization and no individual connected with the games can receive a salary, wage or profit from the conduct of such bingo games.

Opponents point to problems in other states long since corrected by those states. And unlike other states permitting bingo, this proposal does not permit bingo for profit.

Your favorable vote on Proposition 9 will allow those who wish to play an opportunity to play bingo while both enjoying themselves and benefiting charity.

LEROY F. GREENE
Member of the Assembly, 6th District

Rebuttal to Argument in Favor of Proposition 9

Citizens interested in a humane, responsive, crime-free society should vote NO on 9. Legalizing more gambling in California is a step backwards.

The argument that problems in other states have been "long since corrected" is inaccurate. In November of 1975, Florida officials reported to a Federal Gambling Commission: "The abuse of the State Bingo Law is widespread . . . A recent undercover investigation by the Public Safety Department disclosed that for every fifty bingo customers playing nightly, a $1,000 skim of profits goes into the illegal operator's pockets, instead of to the charity as law prescribes. Bingo in Dade County run by professional gamblers now is estimated to produce approximately 4½ million dollars annually in skimmed profits and unreported income."

A NO vote will prevent this kind of corruption.

We are not against bingo. Social bingo and "donation" bingo are now legal in California. We do OPPOSE, however, commercialized bingo—especially unlicensed, unregulated, advertised operations. The enabling legislation contains legal loopholes because it ignores the key recommendations of the Attorney General's Task Force and fails to provide, therefore, meaningful controls.

After several long debates, the enabling legislation passed the Assembly committee by a 5-4 vote, and the Senate committee by a 6-5 vote. Proposition 9 barely got on the ballot.

Most reputable charities prefer to receive support from direct contributions, without depending on gambling profits. Many nonprofit organizations opposed Proposition 9 from its very beginning.

Join us in rejecting this legislation.

Vote NO on Proposition 9.

ROBERT H. BURKE
Member of the Assembly, 73rd District

ALBERT S. RODDA
Member of the Senate, 5th District

APPENDIX "B".

Sec. ___(a) Chapter 53 of the United States Code is amended by adding a new section 1166 to read as follows:

"§1166. Gambling in the Indian country

"Whoever in the Indian country is guilty of any act or omission involving gambling (including the licensing, regulation, or prohibition thereof) which, although not made punishable by any enactment of Congress would be punishable if committed within the jurisdiction of the State in which the act or omission occurred, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(b) The analysis for chapter 53 of title 18 of the United States Code is amended by adding at the end thereof the following:

"§1166. Gambling in the Indian country."

No. 82-1556

IN THE

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October Term, 1982

JOHN DUFFY, The Sheriff of San Diego County, California,
Petitioner,

vs.

THE BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, SAN DIEGO COUNTY, CALIFORNIA,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION.

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Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION.

Respondent supplements its Brief previously filed with the additional reasons why the Writ should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED.

1. The Barona Tribe Has Regulated Its Civil Affairs in Connection With Bingo.

Petitioner and the Amicus Briefs label Bingo as a "money making gambling business" when played on an Indian Reservation. They label Bingo "as a charitable purpose" when played in a Church, Temple or trailer park. They seem to be changing the image of the game by changing the name.

To the Bingo player, Bingo is lawful no matter where it is played in California, and that simply is the test of the policy of the State of California.

California sought to legalize the game and avoid a resultant evil by regulation. As stated in the argument in favor of Proposition #9 in the California Voter's pamphlet (Appendix "A", p. 535), "the statute (AB144) was written to preclude participation by the underworld". This precisely is what California sought by regulation. By removing the profit from the game, the State felt it would remove the evil. Though the Barona Tribe is free to regulate its own civil affairs as it pleases, respondent will demonstrate that the State of California has no monopoly on regulation. The Barona Tribe, through its regulation, has done a better job in avoiding the evil thought to be present by the State.

Since the County of San Diego is not a participant in any of the Bingo games they are forced to invoke stringent regulations to avoid the evil. This is not true with the Barona Tribe. The Barona's government, to-wit: their Tribal Council and Chief, are a direct participant in the enterprise. Their regulation results in much better controls, *i.e.*:

a. They are a participant in all record keeping and in the hiring of an independent accountant to prepare all statements;

b. The Tribe collects, receives and receipts gross sales;

c. The Tribe participates in the counting of all receipts;

d. All funds are deposited in the Tribe's and contractor's joint bank account;

e. No withdrawals can be made without Tribe's consent and signature;

f. No modifications in building without Tribe's consent and they make them;

g. Cashiers are members of the Tribe.

h. Most floor-workers are members of the Tribe;

i. Paymaster is a spouse of Tribal Member;

j. No general manager is hired without consent of the Tribe; and

k. Most Security Guards are members of the Tribe.

As can be readily seen, the Barona Indians' government has injected itself as a direct participant in the enterprise. All monetary controls are with the Tribal Government. Regulation by participation excels regulation by direction.

2. California Laws and Public Policy Have Not Consistently and Continuously Prohibited Gambling.

The Amicus purports to make California look "lilywhite" when they assert that California Laws have consistently and continuously prohibited gambling. Draw poker has been legal in California for many, many years, and there presently exists over forty (40) cardrooms in San Diego County where it is played. These cardrooms are open to the public. (See App. "A")

As far back as 1941, the Courts of California held draw poker and draw poker clubs legal. *Monterey Club v. Superior Court*, 48 Cal. App. 2d 131, 148:

> "Neither playing draw poker nor maintaining a place where it is played being an offense under our law, and therefore being lawful, it follows that the City of Gardena, was authorized to license and regulate the operations of such pastime within its corporate limits, and no action can be maintained in law or equity against one operating a business authorized by statute or ordinance upon the claim that such enterprise or business is a public nuisance. (Civ. Code, sec 3482. . . .)"

Conclusion.

Respondent asserts that Petitioner's opposition stems more from the economic loss of business by Bingo competitors than from any reason asserted in his Petition. For the above reasons Respondent prays the Petition be denied.

Respectfully submitted,

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*A Partnership Including
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ROBERT MYLES HERTZBERG,
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The Barona Group of the
Capitan Grande Band of Mission
Indians, San Diego, California.

APPENDIX "A".

San Diego County.

Golden Nugget Cd'rm
5522 Kearny Villa Rd.
San Diego, CA 92123

Royal Grand Cardroom
6956 El Cajon Blvd.
San Diego, CA 92115

Oasis II
6787 El Cajon Blvd.
San Diego, CA 92115

Lucky Lady Cardroom
5526 El Cajon Blvd.
San Diego, CA 92115

Playhouse Cardroom
4744 El Cajon Blvd.
San Diego, CA 92115

Redwing Cardroom
4014 30th Street
San Diego, CA 92104

Tatum's Cardroom
419 "F" Street
San Diego, CA 92101

Benji's Cardroom
843½ 4th Avenue
San Diego, CA 92101

Monte Carlo Cardroom
851 4th Avenue
San Diego, CA 92101

Ed Bradley's Cardroom
555 5th Avenue
San Diego, CA 92101

Cards R Us Cardroom
4015 El Cajon Blvd.
San Diego, CA 92105

Captains Corner
1022 So. 38th Street
San Diego, CA 92102

Porter's Cardroom
1205 S. 43rd Street
San Diego, CA 92102

Gouthier's Cardroom
2603 Imperial Ave.
San Diego, CA 92102

Rhodesian Cardroom
2952 Imperial Avenue
San Diego, CA 92102

Price's Cardroom
2679 Imperial Ave.
San Diego, CA 92102

Criner's Cardroom
2974 Imperial Ave.
San Diego, CA 92102

Alibi Cardroom
3845 Richmond Street
San Diego, CA 92103

Palomar Cardroom
2724 El Cajon Blvd.
San Diego, CA 92104

Crazy Eddie's Poker Pa.
3052 El Cajon Blvd.
San Diego, CA 92104

My Place Cardroom
4226 University Ave.
San Diego, CA 92105

Red Horse Cardroom
1763 Palm Avenue
San Diego, CA 92154

Boulevard Club 4-Q
4065 El Cajon Blvd.
San Diego, CA 92105

Bicycle Bill's
1130 Scott Street
San Diego, CA 92106

Ocean Beach Cd'rm
5010 Newport Avenue
San Diego, CA 92107

House of Cards
3750 Oceanview Blvd.
San Diego, CA 92113

Goerge's Cardroom
3708 Oceanview Blvd.
San Diego, CA 92113

E.C.'s Cardroom
5863 Market Street
San Diego, CA 92114

Ace's Duc's Cardroom
4701 El Cajon Blvd.
San Diego, CA 92115

Foxy Lady Cardroom
5524 El Cajon Blvd.
San Diego, CA 92115

Star Dust Cardroom
7061 El Cajon Blvd.
San Diego, CA 92115

Maverick Cardroom
1512 Palm Avenue
San Diego, CA 92154

Village Club
429 Broadway
Chula Vista, CA 92010

Vegas Card Club
771 3rd Avenue
Chula Vista, CA 92010

Xanadu's Pastime Club
4088 Bonita Road
Bonita, CA 92002

Jerry's Place
2607 Oceanside Blvd.
Oceanside, CA 92054

Beach Club Cardroom
2280 Garnet Avenue
Pacific Beach, CA 92109

Garnet Cardroom
1138 Garnet Avenue
Pacific Beach, CA 92109

Ocean Casino Cd'rm
712 Garnet Avenue
Pacific Beach, CA 92109

Neptune Club
5726 La Jolla Blvd.
La Jolla, CA 92037

No. 82-1556

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Petitioner,

vs.

THE BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, SAN DIEGO COUNTY, CALIFORNIA,
Respondent.

[redacted] BRIEF OF AMICUS CURIAE FOR THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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No. 82-1556

In The

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Respondent.

~~MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND~~ BRIEF OF AMICUS CURIAE FOR THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The County of Riverside, California, hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the County of Riverside in this case arises from the fact that it is a party to two cases presently pending in the Federal District Court, Central District of California, in which the same issue is before the court, namely, whether Indians may conduct bingo games prohibited by state and local laws on tribal land. (*Miller v. County of Riverside,* No. 83-1004 LEW; *Cabazon Band*

of Mission Indians v. County of Riverside, No. 83-1117 LEW.)

In the instant case petitioner has argued primarily that high-stakes bingo games on Indian land is contrary to the public policy of the State of California, and is thus criminal/prohibitory conduct, but has barely mentioned the right of the state, under certain circumstances, to exercise its civil/regulatory authority over Indians. It is believed that the brief which *amicus curiae* is requesting permission to file will contain a more complete argument on that issue. If this argument is accepted, it could be dispositive of this case.

This motion is being made out of an abundance of caution. Rule 36.4 of the Supreme Court Rules permits the filing of an *amicus curiae* without the necessity of consent when the brief is presented for a political subdivision of a State. Although the petitioner in the instant case is the Sheriff of the County of San Diego, the underlying relief sought by respondent was an order that the County of San Diego, through its Sheriff, could not enforce state or local laws prohibiting bingo on reservation lands. It is believed that the Sheriff stands in the shoes of the County of San Diego and that consent is not, therefore, required.

Dated: April 6, 1983.

Respectfully submitted,

GERALD J. GEERLINGS, County Counsel
GLENN ROBERT SALTER,
Deputy County Counsel

By .....
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BRIEF OF THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The County of Riverside, a political subdivision of the State of California, hereby files this Brief as *Amicus Curiae* pursuant to Rule 36 of the Rules of the Supreme Court of the United States.

Interest of Amicus Curiae

The County of Riverside is a general law county located in the southern part of the State of California. Included within its boundaries are 11 Indian reservations with a total area in excess of 104,000 acres. Not all of the land contained within the reservations is contiguous; in-

stead, there are six reservations which are composed of alternate sections of land arranged in a pattern of checkerboard jurisdiction.

The County of Riverside has a vital interest in the issues raised in the decision of the Ninth Circuit Court of Appeals in *The Barona Group of the Capitan Grande Band of Mission Indians v. Duffy* (9th Cir. 1982) 694 F. 2d 1185, because the decision, in effect, precludes the application of state and local law to the playing of bingo in Indian Country despite the fact that the public policy of California prohibits gambling and only allows the playing of bingo under stringent controls by certain charitable organizations. The County of Riverside is currently litigating its right to enforce state and local laws against gambling and bingo on Indian reservations. (*Miller v. County of Riverside,* No. 83-1004 LEW (C. D. Cal.) [questioning whether individual Indian may conduct bingo on allotted land for profit]; *Cabazon Band of Mission Indians v. County of Riverside,* No. 83-1117 LEW (C. D. Cal.) [questioning whether local ordinances apply to Indian casinos and bingo operations].

For the reasons explained herein, the County of Riverside is vitally interested in whether Indian tribes may, contrary to the expressed public policy of the State of California, operate bingo games on the reservations. The County of Riverside submits this brief *amicus curiae* for the purpose of urging the Court to grant the Petition for Writ of Certiorari of the Sheriff of the County of San Diego and to reverse the decision of the Ninth Circuit Court of Appeals.

———o———

INTRODUCTION

The issue of to what extent Indians are subject to the prohibitions against gambling promulgated by state and local governments has engendered considerable national controversy. The instant case is but one reflection of an ever increasingly growing pool of problems.

It has been estimated that about 100 of the approximately 283 Indian tribes in the United States are presently, or are seriously considering, operating some form of reservation bingo. The Riverside Office of the Bureau of Indian Affairs has indicated that at least ten reservations in Southern California alone, and primarily in Riverside and San Diego County, have expressed strong interest in opening up bingo parlors. Indian bingo is also being actively conducted in Maine, Washington and Arizona as well as other states.

In Arizona, the state legislature responded to the Indians' defiance of its laws by introducing a bill which would bar non-Indians from collecting large cash prizes offered at reservation games. We understand that the bill has passed the House and is now before the Senate.

In Washington, the United States Attorney successfully obtained an injunction against the Lummi Tribe as to their operation of various gambling games contrary to the laws of the State of Washington. (*United States v. Lummi Indian Tribe*, No. C-83-94-C (W. D. Wash.).)

The decision of the Ninth Circuit in the *Barona* case, which not only misinterprets the public policy of the State of California but takes away the regulatory authority of the state, only exacerbates the tension of the situation.

We believe that the present case is of sufficient importance to the entire problem that the Petition for Writ of Certiorari should be granted.

———o———

REASONS FOR GRANTING THE WRIT

A.

California Penal Code Section 326.5 is a criminal/prohibitory statute and is, therefore, enforceable on Indian Reservations against both Indians and Non-Indians.

Bingo has long been prohibited in California, both constitutionally as well as statutorily. (See California Constitution Art. IV, § 19 (a) and former Art. IV, § 26; California Penal Code §§ 319 through 326; 60 Ops. Cal. Atty. Gen. 130, 131 (1977).) And the 1976 amendment to the California Constitution which permitted the Legislature by statute to authorize cities and counties to allow bingo games for charitable purposes only did not reflect a change in the state's public policy towards bingo. (California Constitution Art. IV, § 19 (c); Penal Code § 326.5.)

Shortly after the adoption of that amendment, the California Attorney General was asked whether Penal Code § 326.5 supersedes the provisions of Penal Code §§ 319 through 326 (prohibiting lotteries) as to any bingo game authorized by Penal Code § 326.5 and as to any bingo game not authorized by Penal Code § 326.5. The Attorney General concluded that:

> By its own terms, Penal Code section 326.5 thus specifically supersedes the application of Penal Code sections 319 through 326 as to any authorized bingo games. It does not, however, purport to limit, either expressly or impliedly, the anti-lottery provisions of Penal Code sections 319 through 326 as to any unauthorized game.
>
> [ ] Based upon the foregoing, it is apparent that if the three elements of a lottery are present, *one who operates a bingo game not authorized by Penal Code section 326.5 is subject to prosecution under the laws prohibiting lotteries.*" (See 60 Ops. Cal. Atty. Gen. 130, 132 (1977); emphasis added.)

The opinion of the California Attorney General that any bingo game not conducted in accordance with Penal Code § 326.5 was *expressly prohibited* was apparently unknown to the Ninth Circuit, especially since the Court concluded that the proposed operation was consistent with the "permissive interest" of the statute. To the contrary, it is prohibited by California's anti-lottery laws. In fact, it is quite surprising that in analyzing the public policy of the State of California, the Court did not cite or rely on any cases arising out of the State nor did it undertake any analyses of the history of California's Legislative and Constitutional prohibition of bingo. Instead, the Ninth Circuit found the analysis of *Seminole Tribe of Florida v. Butterworth* (5th Cir. 1981) 658 F. 2d 310 *cert. den.* 455 U. S. 1020 persuasive, even though that case was based on a review of the public policy of the State of Florida.

In *Butterworth,* a 2-1 split decision, after noting that the Florida bingo statute as originally enacted had contained no penal sanctions and that the Florida Supreme Court had decided that bingo was not a prohibited activity

but only one which the state could regulate, the Fifth Circuit concluded that bingo in Florida "appears to fall in a category of gambling that the state has chosen to regulate by imposing certain limitations to avoid abuses." (*Butterworth,* supra, p. 314.) While that may accurately state the public policy of the State of Florida relative to bingo and gambling, history has shown that the public policy of the State of California is often quite different. For example, in *United States v. Farris* (9th Cir. 1980) 624 F. 2d 890 *cert. den.* 449 U. S. 1111 (1981), the Ninth Circuit recognized that 18 U. S. C. § 1955, which prohibits illegal gambling businesses, while applicable to California, had been specifically written so that it would not affect the gambling businesses of Nevada and Florida.

Clearly the public policy of California is, and has always been, that bingo is a prohibited activity. And, just as a statute should not be found to be criminal/prohibitory simply because it includes penal sanctions for its enforcement, neither should a statute be found to be civil-regulatory simply because a narrow exception is engrafted onto what is otherwise an expressly prohibitory statute.

In California, Penal Code § 326.5 is little more than a narrow exception to a clearly prohibitory statute, and emphasizes the public policy of the state that bingo is not to be a money-making venture.[1]

---

[1]One can get a feel for the magnitude of the potential profits involved from a review of the financial statements submitted by the Seminole Tribe for one of their three bingo operations for the seven months ending December 31, 1982. The reports were submitted at a "Gambling Operations" conference for Indians sponsored by Management Concepts Incorporated which was held in Las Vegas, Nevada, on March 28-30, 1983. The total net profit reported for the period for bingo alone was $2,199,400.58 of which the profit for the management company was $955,720.80.

B.

The Ninth Circuit Opinion effectively deprives California, a Public Law 280 state, of that regulatory authority over Indians enjoyed by non-Public Law 280 states.

Even if it could be concluded that Penal Code § 326.5 is civil/regulatory as opposed to criminal/prohibitory, the *Barona* decision fails to analyze or even consider the right of California under its plenary power to enforce its regulatory authority over tribal members or reservation activities. The effect of this omission is that California, a Public Law 280 state, finds itself with less regulatory authority over Indians than that enjoyed by non-Public Law 280 states.

Early in *Barona,* the Ninth Circuit states that because of *Bryan v. Itasca County* (1976) 426 U. S. 373, "a state may not impose general civil/regulatory laws on the reservation". (*Barona,* supra, p. 1188.) A similar statement was made by the Fifth Circuit in *Seminole Tribe of Florida v. Butterworth* (5th Cir. 1981) 658 F. 2d 310, 311 *cert. den.* 455 U. S. 1020. And, once the *Barona* court found that Penal Code § 326.5 was only civil/regulatory, it concluded, without further analysis, that the Indians were not subject in any respect to state law and could conduct their bingo games any way they chose.

But this Court has repeatedly held that the states *do* have regulatory authority over tribal members and of reservation activities *unless* the exercise of state authority has been pre-empted by federal law or it would interfere with the tribe's ability to exercise its sovereign func-

tions. (*Ramah Navajo Sch. Bd. v. Bureau of Revenue* (1982) 102 S. Ct. 3394, citing *White Mountain Apache Tribe v. Bracker* (1980) 448 U. S. 136; *McClanahan v. Arizona State Tax Comm'n* (1973) 411 U. S. 164; *Williams v. Lee* (1959) 358 U. S. 217.) Although Public Law 280 may not have increased a state's civil jurisdiction over Indians to the extent that it initially appeared to, it seems quite unlikely that Congress' attempt to confer additional civil and criminal jurisdiction to certain states over Indians in reality deprived states, like California, of the regulatory authority it already possessed. Public Law 280 was intended as a grant of jurisdiction and was not intended to be a prohibition on the exercise of jurisdiction that a state would otherwise possess. (*People of South Naknek v. Bristol Bay Borough* (D. C. Alaska 1979) 466 F. Supp. 870.)

In other words, once the *Barona* court determined that Penal Code § 326.5 was civil/regulatory, it should have analyzed whether California's regulatory scheme was preempted by federal law or whether it interfered with the tribe's ability to exercise its sovereign functions. Presumably, had this been a non-Public Law 280 state, such an analysis would have been the heart of the opinion.

It seems clear that had this analysis been undertaken here, there is a strong likelihood that California's regulatory authority as to bingo would have been upheld. We are unaware of any relevant federal statutes or laws which would suggest that Congress had either explicitly or impliedly announced its intention to pre-empt this state activity. If anything, a review of relevant federal law suggests Congress' intent to assimilate state law in this regard. In 18 U. S. C. § 1955, illegal gambling under the

laws of the state or its political subdivision constitutes a violation of federal law. Similarly, under the RICO Act (Racketeer Influenced and Corrupt Organizations), 18 U. S. C. § 1961 *et seq.*, a violation of the gambling laws of any state or its political subdivision is prohibited under federal law. Moreover, we do not see the Indians' aim of generating substantial profits from non-Indian players at high-stakes bingo games as an inherent attribute of the tribe's exercise of its sovereign functions. Gambling simply cannot be construed as an "internal tribal matter," regardless of how the profits are used, or the fact that the tribal council controls the game.

California clearly has a significant interest in exercising its regulatory authority over bingo games which are not conducted pursuant to the very stringent requirements of Penal Code § 326.5. Bingo is prohibited in California in large part because of the fear that the very nature of the game, if allowed to be played for high stakes, will result in the take over of legitimate enterprises by organized crime.

Thus, an examination of the relevant state, federal and tribal interests would likely find that California's exercise of its regulatory authority over tribal members and reservation activities is appropriate under *Ramah Navajo*. The failure of the *Barona* court to consider this aspect of the case effectively deprives California of the same regulatory authority over Indians enjoyed by non-Public Law 280 states.

CONCLUSION

Amicus County of Riverside believes that the *Barona* case should be reviewed by this Court because of the pro-

found effect it will have on California as well as all Public Law 280 states.

The *Barona* case will have a significant effect on California because of its conclusion that Penal Code § 326.5 is civil/regulatory and not criminal/prohibitory. Such a conclusion is directly contrary to the history of California public policy relative to bingo, the language of the statute, and the interpretation of the statute given to it by the California Attorney General.

The *Barona* case will also have a significant effect on all Public Law 280 states because of its refusal to analyze the relevant state, federal and tribal interests involved to determine whether California has a legitimate interest in exercising its regulatory authority over bingo games on Indian reservations. The omission of such analysis effectively deprives Public Law 280 states of the same regulatory authority enjoyed by non-Public Law 280 states over Indians and reservation activities.

For both of these reasons and each of them, the County of Riverside prays that the Petition for Writ of Certiorari filed by the County of San Diego and the Sheriff of the County of San Diego, will be granted.

Respectfully submitted,

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Glenn Robert Salter,
Deputy County Counsel

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BRIEF OF THE COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the laws and public policy of California, as regards the operation of a money-making gambling business on an Indian Reservation, are criminal and prohibitory in nature or merely civil and regulatory.

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No. 82-1556

In The

Supreme Court of the United States

October Term, 1982

JOHN DUFFY, the Sheriff of San Diego County, California,

Petitioner,

vs.

THE BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, SAN DIEGO COUNTY, CALIFORNIA,

Respondent.

BRIEF OF THE COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

AUTHORITY TO FILE BRIEF

The County of San Bernardino is a political subdivision of the State of California. This brief is filed pursuant to Rule 36.4 of the Supreme Court Rules.

INTEREST OF THE COUNTY OF SAN BERNARDINO AS AMICUS CURIAE

The County of San Bernardino is contiguous to Riverside County and but a short distance away from San Diego County. It is deeply concerned that Indians on the four reservations within its boundaries are about to start up gambling operations very similar to the ones in the instant case and in Riverside County. This concern in San Bernardino is heightened by the fact that it is the largest county in the continental United States. As such, it must contend with law enforcement problems over a vastly spread area comprised of rapidly developing desert, mountain and urban communities. The four reservations contain well over 37,000 acres of land in diverse locations throughout the county. One, the San Manuel Reservation, borders the rapidly growing City of San Bernardino. Another, the Twentynine Palms Reservation, is very close to a sizeable military base. The largest, the Chemehuevi Reservation, is in an extremely popular recreational area situated along the Colorado River.

The County of San Bernardino fears the imminent development of large-scale, commercial gambling operations at these various sites and the concomitant law enforcement problems they would create. The County of San Bernardino urges this Court to grant a writ of certiorari in this case to consider whether the decision of the Ninth Circuit Court of Appeals properly determined the nature of California's laws and public policy vis-a-vis federal law regarding this spreading law enforcement problem.

QUESTION PRESENTED

Whether the laws and public policy of California, as regards the operation of a money-making gambling business on an Indian Reservation, are criminal and prohibitory in nature or merely civil and regulatory.

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REASONS FOR GRANTING THE WRIT

California laws and public policy have consistently and continuously prohibited gambling and lotteries, including bingo, notwithstanding the narrow exception accorded charitable bingo.

The crux of the matter in this case is whether California laws, and public policy behind those laws, are criminal and prohibitory in nature so as to make section two of Public Law 280 (Act of August 15, 1983, Pub. L. No. 83-280, 67 Stat. 588, Codified as 18 U. S. C. § 1162) applicable, and California law on the subject enforceable, on Indian Reservations in California.

Shortly after passage of the charitable bingo amendment to the California Constitution, the Attorney General for the State of California had an opportunity to review the history of California law and public policy on lotteries and bingo in this state. [60 Ops. Cal. Atty. Gen. 130 (1977).] The Attorney General explained that California had a long history of absolutely prohibiting lotteries (Id. at 131). Bingo is such a lottery in California (Id.; Report of the Office of the Legislative Counsel of the State of California, Vol. 2 of the Appendix to the Journal of the Assembly of California, 1963, at page 13 of Vol. 27, No. 2 of the Assembly Interim Committee Reports, therein).

The recent enactment of California Penal Code Section 326.5 (Deerings 1975), a very limited exception to the long-standing prohibition against lotteries, did not alter the basic public policy in California of prohibiting gambling as anathema to the public welfare. The Attorney General straightforwardly warned that if the three elements of a lottery are present (i. e., a prize distributed by chance for consideration), one who operates a bingo game outside the strict constraints of this Penal Code section is subject to prosecution under the laws prohibiting lotteries (Id.).

The language of this Attorney General opinion underscores the prohibitory nature of California laws and public policy towards bingo and gambling generally. California seeks to prevent large-scale money-making schemes. In short, unlike some other licensed enterprises or activities which are basically lawful per se, bingo is basically unlawful. *City of Pomona v. Christian Fellowship Center,* 125 Cal. App. 3d 250, 252-53 (1981). "It bears emphasis, . . . that it is very difficult, if not impossible, to devise any scheme, . . ., which will not be in violation of the lottery laws. (citing cases)" 60 Ops. Cal. Atty. Gen. 130, 132 (1977).

A brief look at the California Constitutional provisions relating to lotteries is illuminating. Article IV, Section 19 of the California Constitution reads:

> (a) The Legislature has no power to authorize lotteries and shall prohibit the sale of lottery tickets in the State.
>
> (b) The Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results.

> (c) Notwithstanding subdivision (a), the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes.

The language of the charitable bingo amendment, in subsection (c), refers back to subsection (a) which prohibits lotteries. The most logical interpretation of this wording of the statute is that subsection (c) represents a limited exception to the absolute prohibition on lotteries. Indeed, bingo played outside the strict confines of the statute, drafted pursuant to this provision, is a prohibited lottery, supra. Had the Legislature meant to draft a civil, regulatory subsection, it would have couched the language in subsection (c) parallel to the wording of subsection (b), relating to horse racing. Subsection (c) would have read, "The Legislature may provide for the regulation of bingo games. . . ." It did not do so; such games are basically illegal in California.

While the Butterworth case is in many respects germane to the instant case, it should not be considered controlling in light of the disparate history regarding gambling laws in California and Florida.

While the *Butterworth* case, relied upon by the Ninth Circuit Court of Appeals in the instant case, is in many respects germane to this case and provides an outline for relevant discussion, it should not be considered persuasive [*Seminole Tribe of Florida v. Butterworth*, 658 F. 2d 310 (5th Cir. 1981), cert. den. 455 U. S. 1020 (1982), cited in *Barona Group of the Capitan Grande Indians v. Duffy*, 694 F. 2d 1185, 1188 (1982)]. Florida's history, both with

respect to Public Law 280 and, moreover, regarding gambling is altogether distinct from California's.

The Fifth Circuit, in the *Butterworth* case, had before it a bingo statute which, in its inception, had *no criminal sanctions* whatsoever and a Florida Supreme Court which had determined that bingo was not a prohibited activity in Florida. [*Seminole Tribe of Florida v. Butterworth*, 658 F. 2d 310, 314 (5th Cir. 1981), cert. den. 455 U. S. 1020 (1982)]. That the Fifth Circuit, in its split (2-1) decision barely decided that, under these circumstances, bingo appeared to be merely a regulated activity in Florida, rather than one which is generally prohibited, is not surprising. But, it does not address the status of the law, as shown supra, in California.

Public Law 280 was drafted primarily to encourage states to combat lawlessness on reservations and to make the Indian population subject to the same state criminal laws as any other citizen.

Carole Goldberg, in her article entitled "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians," 22 UCLA L. Rev. 535, 541, explained that the primary purpose of Public Law 280 was to combat ". . . lawlessness on the reservations. . . ." Originally, California was to be the only state conferred jurisdiction over Reservation Indians (Id. at 540). Ultimately, however, Congress sought the cooperation of all states in this matter of great concern. Only five states, including California, accepted the responsibility when it was first offered (Id. at 537). Florida was not among them (Florida belatedly undertook this task after 1961, Id. at 568). Cali-

fornia, therefore, unlike Florida, has had not only an unswerving commitment to prohibiting gambling but also a firm commitment to enforcing such laws on all its citizens since the inception of Public Law 280.

Public Law 280, as it relates to enforcement of California's criminal laws throughout the state, is abundantly clear.

The Ninth Circuit's opinion, in this case, acknowledged the closeness of the question at hand (*Barona* at 1190). The Court strove to find various and sundry doctrines with which it might tip the scales in favor of blocking enforcement of California's laws prohibiting gambling throughout the state. The Court suggested there were ambiguities in the law which should be resolved in favor of the Indians (Id.). But, in reading 18 U. S. C. Section 1162(a) it is hard to find any such ambiguity. It says, simply, that each of the states listed shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed—in California this is, "All Indian country within the State"—to the same extent that such State had jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State. . . . It is difficult to see what is "ambiguous" about this statute.

If state jurisdiction over reservations is disfavored, Congress would repeal its law which provides for such jurisdiction.

The Ninth Circuit asserts that State jurisdiction over reservations is disfavored (*Barona* at 1190). If Federal policy truly was to relinquish all control under state law

on activities conducted on Indian land, Congress would have repealed Public Law 280 altogether. It has not done so. There is no way to avoid the fact that California, under Federal law, has jurisdiction on Indian as well as non-Indian land when its prohibitory laws are broken, as here.

CONCLUSION

The *Barona* case has profound implications. The bingo operation in San Diego is not an isolated situation. It is a spreading problem which is creating substantial law enforcement concerns.

The County of San Bernardino respectfully asserts that the Ninth Circuit Court of Appeals failed to distinguish between the long-standing, unswerving prohibitory nature of California's laws relating to gambling and bingo and Florida's reluctant, piecemeal approach to these matters.

If allowed to stand, this ruling appears to give Indian citizens carte blanche to disregard the penal laws relating to gambling in California.

For these reasons, the County of San Bernardino prays that the Petition for Writ of Certiorari filed by the County of San Diego be granted.

Respectfully submitted,

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